Kamalul Arifin bin Yusof v Mayban Trustees Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)-2553–10 OF 2011
SULUNG MATJERAIE, MOHD HISHAMUDIN, ABDUL WAHAB PATAIL JJCA
4 DECEMBER 2012

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Civil Procedure — Appeal — Finding of fact by trial judge — Interference by Court of Appeal — Whether appellate interference warranted — Whether trial judge erred in his findings — Whether appellant raised issues that were not part of his pleaded case

D

Evidence — Burden of proof — Person who alleged fact had to prove it — Respondents' failure to produce special resolution — Whether trial judge erred in finding that respondents had proved that there was special resolution

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The appellant was the majority shareholder of Aldwich Enviro Management Sdn Bhd ('AEM'), a company which was in the business of providing environmental management services. AEM decided to venture into waste oil refining and in order to fund this expansion it decided to embark on an exercise known as a private debt securities programme ('the PDS programme'). The second respondent, a subsidiary of Maybank Bhd, devised the PDS programme whereby the entire business of AEM was to be sold to Aldwich Bhd, a wholly owned subsidiary of AEM, which was incorporated specifically for the purpose of the PDS programme. Aldwich Bhd was to pay the sale price of RM308,338,961 to AEM by way of obtaining funds to be raised by way of issuance of financial instruments, namely bonds and notes. The second respondent then went on to prepare a document called the information memorandum for the issue of RM293 million nominal zero coupon redeemable secured bonds (senior bonds) and RM584 million nominal zero coupon redeemable junior secured serial notes (junior notes) for a period of 15 years. The senior bonds and junior notes were to be floated on the capital market and sold to investors at a discounted price, redeemable annually by the issuer, Aldwich Bhd, over a period of 15 years. Under the PDS programme, Aldwich Bhd, the issuer of the bonds and notes, furnished securities to secure the bondholders and the noteholders. Initially, the second respondent was the subscriber of all the senior bonds issued by Aldwich Bhd but subsequently six other banks became holders of the senior bonds. The appellant became the sole holder of the junior notes. It was a term of the senior bonds trust deed ('the trust deed') that when any one of the trigger events listed in the trust deed were to occur, then the first respondent, the trustee for the senior bondholders,

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should declare the occurrence of a trigger event. If subsequent to the declaration of the trigger event an event of default occurred then the first respondent trustee could if so directed by a special resolution, declare an event of default by giving the necessary notice to Aldwich Bhd and all outstanding bonds would be immediately due and repayable. When Aldwich Bhd failed to service the debt service reserve account and thereby breached a clause of the trust deed, the first respondent declared a trigger event. Aldwich Bhd had failed to remedy the breaches. Thus, the first respondent had pursuant to a special resolution by the senior bondholders, declared the occurrence of an 'event of default' and on the same day issued an enforcement notice to the second respondent. Acting on the enforcement notice, the second respondent proceeded to appoint two persons as the receivers and managers of Aldwich Bhd. The appellant filed a suit against the respondents for breach of trust and fiduciary duties and a breach of contract. It was the appellant's case, inter alia, that the first respondent had failed as common trustee to exercise fairness between the senior bondholders and the junior noteholder. The appellant also submitted that the enforcement notice that was issued by the first respondent to the second respondent was issued without a special resolution declaring an event of default as required by the trust deed and that the second respondent had failed to properly exercise its discretion as to whether to appoint a receiver and manager. The respondents' defence was that their duties were only administrative in nature and that the transaction documents had not given them the discretion to waive a default.

Held, dismissing the appeal with costs of RM75,000:

(1) The High Court judge was right in his decision to reject the appellant's argument that the enforcement notice that was issued by the first respondent to the second respondent was issued without a special resolution declaring an event of default as required by the trust deed on the grounds that this issue was not the pleaded case of the appellant. Parties had to confine themselves to their pleaded case. In any event, the trial judge had, based on the totality of the evidence, made a finding of fact that there was in fact a special resolution of the senior bondholders declaring an event of default; and there was no reason to disagree with that finding of fact (see para 32).

(2) Based on the evidence there was no basis to disagree with the trial judge's findings that the second respondent's decision to appoint receivers and managers was totally justified. As such, the appellant's claim against the second respondent was clearly devoid of any merit (see para 35).

(3) (per **Abdul Wahab Patail JCA, dissenting**) The crux of the matter in the present appeal was whether the representation by the first respondent that there was a special resolution by the senior bondholders was in fact true of false. The trust deed had defined a special resolution as meaning a

resolution passed at a meeting of the senior bondholders duly convened and carried by a majority consisting of not less than3/4 or 75% of the persons present and voting by a majority consisting of not less than 75% of the senior bondholders. Although the respondents had failed to produce the special resolutions, which they had represented and maintained that they had, the trial judge had made a finding that the respondents had proved that there was a special resolution by the senior bondholders based on, inter alia, letters of notification to the appellant of the passing of the special resolution to this effect; a circular resolution by CIMB, a senior bondholder; and the oral testimony of a respondent witness that special resolutions similar to the sample by CIMB were signed by over 95% of the senior bondholders. The trial judge had erred in his finding. The failure of the respondents to produce evidence of the special resolution by the senior bondholders holding 75% let alone 95% of the aggregate nominal value of the senior bonds proved upon a balance of probabilities that the respondents did not have the special resolution as defined in the trust deed. In the circumstances, the acts of the respondents, which were founded upon the purported special resolution, were null and void (see paras 68–70).

[Bahasa Malaysia summary

Perayu merupakan pemegang saham majoriti Aldwich Enviro Management Sdn Bhd ('AEM'), sebuah syarikat yang dalam perniagaan menyediakan perkhidmatan pengurusan persekitaran. AEM memutuskan untuk menerokai penapisan buangan minyak dan bagi tujuan membiayai perkembangan ini ia memutuskan untuk menerokai amalan yang dikenali sebagai program sekuriti hutang persendirian ('program SHP'). Responden kedua, subsidiari Maybank Bhd, telah mereka program SHP di mana keseluruhan perniagaan AEM akan dijual kepada Aldwich Bhd, subsidiari milik penuh AEM, yang diperbadankan khusus bagi tujuan program SHP itu. Aldwich Bhd perlu membayar harga jualan RM308,338,961 kepada AEM dengan mendapatkan pembiayaan yang diperoleh daripada pengeluaran instrument kewangan, iaitu bon-bon dan nota-nota. Responden kedua kemudian telah menyediakan dokumen yang dipanggil memorandum maklumat untuk mengeluarkan RM293 juta bon-bon terjamin kupon nilai sifar yang boleh tukar ('bon-bon senior') dan RM584 juta nota-nota junior bersiri terjamin kupon nilai sifar yang boleh tukar ('nota-nota junior') bagi tempoh 15 tahun. Bon-bon senior dan nota-nota junior tersebut diapung di pasaran modal dan dijual kepada pelabur-pelabur pada harga potongan, yang boleh tukar setiap tahun oleh pengeluar, Aldwich Bhd, pemilik selama tempoh 15 thun. Di bawah program SHP, Aldwich Bhd, pengeluar bon-bon dan nota-nota tersebut, menyediakan jaminan untuk menjamin para pemegang bon dan para pemegang nota. Pada mulanya, responden kedua merupakan pelanggan kesemua bon-bon senior yang dikeluarkan oleh Aldwich Bhd tetapi kemudian enam bank lain telah menjadi pemegang bon-bon senior tersebut. Perayu menjadi satu-satunya

pemegang nota-nota junior tersebut. Adalah terma surat ikatan amanah bon-bon senior ('surat ikatan amanah tersebut') bahawa apabila mana-mana satu kejadian pencetus seperti disenaraikan dalam surat ikatan amanah itu belaku, maka responden pertama, pemegang amanah untuk para pemegang bon senior tersebut, patut mengisytiharkan berlakunya kejadian pencetus itu. Berikutan deklarasi kejadian pencetus itu, jika satu kejadian kegagalan berlaku maka responden pertama pemegang amanah boleh jika diarahkan melalui resolusi khas, mengisytiharkan kejadian kegagalan itu dengan memberikan notis yang perlu kepada Aldwich Bhd dan semua bon-bon tertungggak perlu dibayar dan boleh dibayar balik dengan serta merta. Apabila Aldwich Bhd gagal melangsaikan akaun rizab perkhidmatan hutang dan dengan itu melanggar fasal surat ikatan amanah itu, responden pertama mengisytiharkan satu kejadian pencetus. Aldwich Bhd telah gagal meremedikan pelanggaran-pelanggaran itu. Oleh demikian, responden pertama telah berikutan resolusi khas oleh para pemegang bon senior, mengisytiharkan 'kejadian pencetus' yang telah berlaku itu dan pada hari yang sama mengeluarkan notis penguatkuasaan kepada responden kedua. Bertindak atas notis penguatkuasaan itu, responden kedua seterusnya melantik dua orang sebagai penerima dan pengurus Aldwich Bhd. Perayu telah memfailkan guaman terhdap responden-responden kerana pelanggaran kewajipan amanah dan fidusiari dan pelanggaran kontrak. Adalah kes perayu, antara lain, bahawa responden pertama telah gagal sebagai pemegang amanah biasa untuk melaksanakan keadilan antara para pemegang bon senior dan pemegang nota junior. Perayu juga berhujah bahawa notis penguatkuasaan yang dikeluarkan oleh responden pertama kepada responden kedua telah dikeluarkan tanpa resolusi khas mengisytiharkan kejadian pencetus sebagaimana dikehendaki oleh surat ikatan amanah tersebut dan bahawa responden kedua telah gagal untuk melaksanakan budi bicara sewajarnya berhubung sama ada untuk melantik penerima dan pengurus. Pembelaan responden-responden adalah bahawa kewajipan mereka hanyalah bersifat pentadbiran dan bahawa transaksi dokumen-dokumen itu tidak memberikan mereka budi bicara untuk mengetepikan kegagalan itu.

Diputuskan, menolak rayuan dengan kos RM75,000:

(1) Hakim Mahkamah Tinggi adalah betul dalam keputusannya untuk menolak hujah perayu bahawa notis penguatkuasaan yang dikeluarkan oleh responden pertama kepada responden kedua telah dikeluarkan tanpa resolusi khas yang mengisytiharkan kejadian kegagalan sebagaimana dikehendaki surat iktan amanah tersebut atas alasan bahawa isu ini bukan yang dipli perayu. Pihak-pihak terpaksa membatas diri mereka kepada kes yang dipli oleh mereka. Dalam apa keadaan, hakim perbicaraan telah, berdasarkan keseluruhan keterangan, membuat penemuan fakta bahawa pada hakikatnya terdapat resolusi khas para

pemegang bon senior yang mengisytiharkan kejadian kegagalan itu; dan tiada sebab untuk tidak bersetuju dengan penemuan fakta itu (lihat perenggan 32). A

(2) Berdasarkan keterangan tiada asas untuk tidak bersetuju dengan penemuan hakim pebicaraan bahawa keputusan responden kedua untuk melantik penerima dan pengurus adalah amat wajar. Oleh itu, dakwaan perayu terhadap responden kedua jelas tidak mempunyai apa-apa merit (lihat perenggan 35). B

(3) (oleh **Abdul Wahab Patail HMR, menentang**) Intipati perkara dalam rayuan ini adalah sama ada representasi oleh responden pertama bahawa terdapat resolusi khas oleh para pemegang bon senior pada hakikatnya adalah benar atau palsu. Surat ikatan amanah itu mentafsirkan resolusi khas sebagai bermaksud satu resolusi yang diluluskan di mesyuarat pemegang bon senior yang telah diadakan dan dilaksanakan secara majoriti yang terdiri daripada tidak kurang tiga perempat atau 75% orang yang hadir dan undian secara majoriti tidak kurang daripada 75% pemegang bon senior. Walaupun responden-responden telah gagal mengemukakan resolusi khas tersebut, yang mana mereka telah memberi representasi dan mengekalkan bahawa mereka telah berbuat sedemikian, hakim perbicaraan telah membuat penemuan bahawa responden-responden membuktikan bahawa terdapat resolusi khas oleh pemegang bon senior berdasarkan, antara lain, surat pemberitahuan kepada perayu berhubung kelulusan resolusi khas itu yang terlaksana; satu pekeliling resolusi oleh CIMB, pemegang bon senior; dan keterangan lisan saksi responden bahawa resolusi khas yang sama dengan sampel CIMB telah ditandatangani oleh lebih 95% pemegang bon senior. Hakim perbicaraan terkhilaf dalam penemuannya. Kegagalan responden-responden untuk mengemukakan keterangan resolusi khas oleh pemegang bon senior yang memegang 75% itu patah lagi 95% daripada nilai nominal agregat bon-bon senior membuktikan atas imbangan kebarangkalian bahawa responden-responden tidak mempunyai resolusi khas sepertimana ditafsirkan dalam surat ikatan amanah tersebut. Dalam keadaan ini, perbuatan responden-responden, yang berasaskan resolusi khas yang dimaksudkan, adalah terbatal dan tidak sah (lihat perenggan 68–70).] C D E F G H

Notes

For cases on finding of fact by trial judge, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1194–1195.

For cases on person who alleged fact had to prove it, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 655–669. I

Cases referred to

Citibank NA and another v QVT Financial LP [2008] 1 BCLC 376, CA (refd)

Elektrim SA v Vivendi Holdings 1 Corp; Law Debenture Trust [2008] EWCA Civ 1178, CA (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86; [1980] 1 LNS 31, FC (refd)
Newdigate Colliery Ltd, Re [1912] 1 Ch 468, CA (refd)
Sabah Development Bank Berhad v Zulkifli bin Kassim & Anor Kota Kinabalu Civil Suit No K22–52–2006–11 (refd)
Salter v Leas Hotel Co [1902] 1 Ch 332 (refd)
UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd & other appeals [2007] 6 MLJ 530; [2007] 5 CLJ 489, CA (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: Civil Suit No D22(NCC)–2339 of 2010 (High Court, Kuala Lumpur)

Sulaiman bin Abdullah (V Manokaran, MR Kumar and N Yohendra with him) (Kumar & Associates) for the appellant.
Robert Lazar (Lai Wai Fong, TT Toi and Chai Siew Wan with him) (Shearn Delamore & Co) for the respondents.

Mohd Hishamudin JCA (delivering majority judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court of Kuala Lumpur of 30 September 2011 dismissing the appellant's/plaintiff's claim against the respondents/defendants for breach of contract (breach of a trust deed) and breach of fiduciary duty. The appellant claims damages against them.

[2] On 7 March 2012, this court, after hearing submissions, by a majority decision (Sulong Matjeraie and Mohd Hishamudin Yunus JJCA), dismissed the appeal with costs (Abdul Wahab Patail JCA dissenting).

[3] We (the majority) now give our grounds of judgment.

BACKGROUND FACTS

[4] The appellant/plaintiff, Kamalul Arifin Yusof, is the majority shareholder of a company called Aldwich Enviro Management Sdn Bhd ('Aldwich Enviro').

[5] Aldwich Enviro was in the business of providing environmental

management services. In 2000 it was one of the largest petro-chemical derived waste recycling, recovery and reuse facility operators in Malaysia. The company owned and operated at Kemaman (in Kerteh region, Terengganu), on a 20-acre land, the only plant in Malaysia capable of resource recovery from oil and gas wastes. The plant was specially set up in Kerteh as this region is the major oil and gas hub of Malaysia.

[6] In the year 2002, Aldwich Enviro decided to expand its business by venturing into waste oil refining and building a waste oil refinery. For this purpose, Aldwich Enviro needed funds. Aldwich Enviro decided to raise the funds via an exercise known as a private debt securities programme (the 'PDS programme'). Under this programme, bonds and notes would be issued and made available to investors to subscribe.

[7] Maybank Bhd ('Maybank') was the banker for Aldwich Enviro. Aldwich Enviro decided to undertake the PDS programme with the appointment of a merchant bank called Aseambankers (now known as 'Maybank Investment Bank Bhd', that is to say, the second respondent/second defendant) as the lead arranger. Maybank Investment Bank Bhd is a subsidiary of Maybank. In this judgment, the second respondent/second defendant will be referred to as 'Maybank Investment'.

[8] Maybank Investment devised the PDS programme whereby the entire businesses of Aldwich Enviro at Kemaman was sold to a new special purpose vehicle company called 'Aldwich Bhd', a wholly owned subsidiary of Aldwich Enviro incorporated specifically for the purpose of the PDS programme.

[9] The sale price of the sale of the entire businesses of Aldwich Enviro to Aldwich Bhd was RM308,338,961. Aldwich Bhd was to pay this sum to Aldwich Enviro by way of obtaining funds to be raised by way of the issuance of financial instruments, namely, bonds and notes. These bonds and notes were to be raised through the capital market with the assistance and advice of Maybank.

[10] The second respondent (Maybank Investment), accordingly, prepared a document called an 'information memorandum' for the issuance by Aldwich Bhd ('the issuer') of:

(a) RM293m of nominal value zero coupon redeemable secured bonds (in this judgment we will be referring to these bonds as 'senior bonds'); and

(b) RM584m of nominal value zero coupon redeemable junior secured serial notes (in this judgment we will be referring to these notes as 'junior notes'). The tenure of the PDS programme was a period of 15 years.

[11] A serial zero coupon programme is an issuance of non-interest bearing bonds and notes that are redeemable annually upon maturity at its face value. A subscriber takes up the bonds and notes at a discount. The bonds and notes were to be redeemed annually by the issuer, Aldwich Bhd, over a period of 15 years. The face value of the bonds and notes would be the nominal value of the bonds and notes. The profit to the subscriber is the difference between the nominal value and the actual purchased/subscribed price of the bonds and notes.

[12] Under the PDS programme, Aldwich Bhd, as the issuer of the bonds and notes, furnished securities to secure the bondholders as well as the noteholders.

[13] As part of the PDS programme, Aldwich Bhd and Aldwich Enviro entered into the following agreements:

(a) an agreement called the 'business sales agreement 1' dated 13 May 2003 ('the first BSA'), for the purchase by Aldwich Bhd the catalyst recovery and tank cleaning business of Aldwich Enviro;

(b) an agreement called the 'business sale agreement 2' dated 13 May 2003 ('the second BSA'), whereby Aldwich Bhd purchased the waste oil recycling business from Aldwich Enviro;

(c) a supplementary agreement to the first BSA dated 18 July 2003;

(d) a second supplementary agreement to the first BSA dated 7 August 2003; and

(e) a supplementary agreement to the second BSA dated 7 August 2003.

[14] The total consideration under the two BSAs was RM308,338,961. A part of the payment of the total consideration, in the sum of RM131,505,000, was paid to Aldwich Enviro by way of the issuance of the notes.

[15] Further, the following instruments were also executed under the PDS programme:

(a) an agreement called the security agency agreement dated 22 May 2003 between Aldwich Bhd, Aldwich Enviro, the first respondent (Mayban Trustees Bhd; in this judgment we will be referring to the first respondent as 'Mayban Trustees'), and the second respondent (Maybank Investment), whereby the second respondent was appointed as the security agent;

(b) a trust deed dated 22 May 2003 executed by Aldwich Bhd and the first respondent (Mayban Trustees) in relation to the senior bonds

(hereinafter referred to as the 'senior bonds trust deed') whereby the first respondent/Mayban Trustees was appointed as the trustee of the senior bondholders;

(c) a trust deed dated 22 May 2003 executed by Aldwich Bhd and the first respondent (Mayban Trustees) in relation to the junior notes (in this judgment will be referred to as the 'junior notes trust deed') whereby the first respondent (Mayban Trustees) was appointed as the trustee of the junior noteholders;

(d) a debenture dated 22 May 2003 by Aldwich Bhd over the fixed and floating assets of Aldwich Bhd;

(e) a debenture dated 22 May 2003 executed by Aldwich Enviro over its fixed and floating assets, in particular, its waste oil refinery on the 20 acre land in Kemaman;

(f) a land charge executed by Aldwich Bhd in favour of the first respondent (Mayban Trustees) dated 22 July 2003 over a piece of land of approximately 20 acres and held under title No HS(D) 3033, Lot No PT 5011, Mukim Teluk Kalung, Daerah Kemaman, Terengganu; and registered on 23 July 2003;

(g) an assignment and charge dated 22 May 2003 between Aldwich Bhd and Maybank Investment (the second respondent) in respect of the assignment and charge over the cash flow proceeds of Aldwich Bhd; and

(h) an assignment dated 22 May 2003 between Aldwich Enviro and the second respondent (Maybank Investment) in respect of the contract proceeds due to Aldwich Enviro.

[16] Initially, Maybank Investment (the second respondent) was the subscriber of all the senior bonds that were issued by Aldwich Bhd.

[17] Subsequently, the following banks became the holders of the senior bonds under the PDS programme:

(a) Maybank;

(b) Ambank (M) Bhd;

(c) CIMB Bank Bhd;

(d) OCBC Bank Malaysia Bhd;

(e) RHB Investment Bank Bhd; and

(f) HSBC Bank Bhd.

[18] The appellant in the present appeal (Kamalul Arifin), on 30 April 2005,

acquired from Aldwich Enviro the junior notes thus becoming the sole holder of the junior notes. However, he had not made any payment for the junior notes.

[19] The redemption of the junior notes was subject to the redemption or discharge in full of the senior bonds.

[20] The senior bonds and the junior notes share common securities. However, the senior bonds enjoy priority over the junior notes over the common securities.

[21] The senior bondholders were entitled to take enforcement actions upon the occurrence of an 'event of default' without the concurrence of the junior noteholders. The latter, however, require the concurrence of the former in taking such enforcement actions.

[22] Pursuant to cl 10 of the senior bonds trust deed, when any of the trigger events enumerated in cl 10.1(a)–(l) occurs, and that trigger event continues for 30 days, Mayban Trustees (the first respondent) shall declare the occurrence of a 'trigger event' if directed by a special resolution of the senior bondholders. The declaration of the trigger event would accelerate the due date for payment of all sums due under the senior bonds and such sums would then become due by the next 'legal final maturity date'.

[23] From the first year (2004) for the redemption of the senior bonds until 2009, the senior bondholders were diligently paid annually. The total amount paid to the senior bondholders during this period was RM92,000,000.

[24] However, on 12 January 2010, the first respondent (Mayban Trustees), as the trustee for the senior bondholders, pursuant to a special resolution by the senior bondholders, declared a 'trigger event' by reason of the breach by Aldwich Bhd of cl 10.1(c) of the senior bonds trust deed (that is, the failure to service the debt service reserve account).

[25] Six days after the declaration of the trigger event, that is to say, on 18 January 2010, the first respondent/Mayban Trustees issued a notice of non-compliance to Aldwich Bhd setting out several breaches of the transaction documents under the PDS programme (namely, the senior bonds trust deed, the assignment and the charge).

[26] Pursuant to cl 11.1(c) of the senior bonds trust deed, Aldwich Bhd had 30 days from 18 January 2010 to remedy the breaches of the transaction documents, failing which the first respondent/Mayban Trustees may then, or if

so directed by a special resolution of the senior bondholders, declare an event of default. Accordingly, the first respondent (Mayban Trustees) issued reminders to Aldwich Bhd that the thirty-day remedy period would expire on 17 February 2010.

[27] Aldwich Bhd admitted to the breaches of the transaction documents and endeavoured to furnish an explanation for its failure to make payments into the debt service reserve account by referring to cash flow problems that Aldwich Bhd was having at that time.

[28] As at 17 February 2010, Aldwich Bhd failed to remedy the breaches of the transaction documents.

[29] On 18 February 2010, the first respondent (Mayban Trustees), pursuant to a special resolution by the senior bondholders, declared the occurrence of an 'event of default'.

[30] On the same day, that is to say, 18 February 2010, the first respondent (Mayban Trustees) issued an 'enforcement notice' pursuant to cl 4.2 of the security agency agreement to the second respondent (Maybank Investment) on the ground that Aldwich Bhd had failed to remedy the breaches.

[31] The second respondent (Maybank Investment), consequently, acting pursuant to the enforcement notice, on 8 March 2010, appointed the following two persons, namely:

(a) one Gan Ah Tee; and

(b) one Mok Chew Yin,

as the receivers and managers of Aldwich Bhd.

THE APPELLANT'S CLAIM AGAINST THE FIRST RESPONDENT (MAYBAN TRUSTEE)

[32] In this appeal, Dato' Hj Sulaiman Abdullah, learned counsel for the appellant (Encik Kamalul), submitted that the issuance of the enforcement notice by the first respondent (Mayban Trustees) to the second respondent (Maybank Investment) was a breach of the senior bonds trust deed as there was no documentary evidence of a special resolution of the senior bondholders declaring the occurrence of an event of default by Aldwich Bhd. The same argument was also canvassed before the High Court. With respect, we agree with the decision of the learned High Court judge that the argument must be rejected simply on the ground that it was not the pleaded case of the appellant that there was no special resolution of the senior bondholders declaring the

occurrence of an event of default. Parties must confine themselves to their pleaded case. Therefore, we find no merit when the appellant urged the High Court (as well as this court) to invoke s 114(g) of the Evidence Act 1950 merely because the first respondent's main witness, Ms Jennifer Wong ('DW4'), when cross-examined by the appellant's counsel during the trial, was not able to produce the special resolution of the senior bondholders. Such an argument clearly was out of place. In any event, the learned trail judge, based on the totality of the evidence, had made a finding of fact that there was in fact a special resolution of the senior bondholders declaring an event of default; and we find no reason to disagree with that finding of fact.

THE APPELLANT'S CLAIM AGAINST THE SECOND RESPONDENT (MAYBANK INVESTMENT)

[33] Now, coming to the appellant's claim against the second respondent (Maybank Investment), the allegation is that the second respondent had failed to properly exercise its discretion pursuant to cl 6.1 of the security agency agreement when it appointed receivers and managers, when it should have, instead, just appointed a manager. The appellant further submitted that Aldwich Bhd was a going concern with lucrative contracts at the material time. It was contended that there was a breach of fiduciary duty on the part of the second respondent; and that the appointment of the receivers and managers was void. Now, cl 6.1 of the security agency agreement reads:

> 6.1 At any time after the security created by the Security Documents becomes enforceable, the Security Agent may appoint any person or persons to be Receiver and / or Manager of the relevant charged Assets or any part thereof, and may remove and Receiver and / or Manager so appointed and appoint another in his stead, in every such case in accordance with the Security Documents.

[34] The learned trial judge, in his grounds of judgment, ruled:

> In my judgment, the appointment of receivers and managers was totally justified on the particular facts of this case since it is not in dispute that Aldwich Bhd was not a profitable going concern with lucrative contracts, at the material time as claimed by the plaintiff and his witnesses. The accounting records of the plaintiff paint a very different picture of the financial condition of the plaintiff from that provided by the plaintiff. The accounting records reveal the plaintiff to have been suffering losses every year since its inception and as at the date of the declaration of the event of default on 18 February 2010, Aldwich Bhd had failed to make payments into the DSRA for seven consecutive months.

[35] On the evidence, and upon reading cl 6.1, we find no basis to disagree with the learned trial judge. We would add that the appellant's claim against the second respondent is clearly devoid of any merit.

[36] Appeal dismissed with costs of RM75,000 for both the respondents; decision of the High Court affirmed.

Abdul Wahab Patail JCA (dissenting):

[37] The appellant/plaintiff Kamalul Arifin bin Yusof ('the appellant') appealed before this court against the judgment of the High Court dismissing his claim against the respondents/defendants Mayban Trustees Bhd and Maybank Investment Bank Bhd.

BACKGROUND

[38] The appellant was the majority shareholder of Aldwich Enviro-Management Sdn Bhd ('AEM'). It was involved in the business of providing environmental management services. AEM also owned at Telok Kalong, Kemaman, a 20-acre piece of land on which it operated the only plant in Malaysia capable of resource recovery from oil and gas wastes.

[39] In the year 2002, AEM approached its bankers Malayan Banking Bhd ('MBB') to fund its expansion into waste oil refining. It needed funding to build a waste oil refinery. MBB advised the appellant to undertake a private debt securities ('PDS') programme where bonds and notes would be issued to subscribing private investors.

[40] MBB appointed Maybank Investment Bank Bhd ('MIB'), then known as Aseambankers Malaysia Bhd, to make the arrangements for AEM.

[41] MIB structured a PDS programme where the entire businesses of AEM as well as the entire integrated recycling, recovery and reuse facility at Telok Kalong, Kemaman was sold to Aldwich Bhd, a new company incorporated for that purpose and wholly owned by AEM. Aldwich Bhd purchased the entire business of AEM for a sum of RM308,338,961 funded by issuing bonds and notes in the capital market.

[42] For the 15-year PDS programme commencing 2004, MIB prepared an information memorandum for the issue of RM293m nominal value zero coupon redeemable secured serial bonds (senior bonds) and RM584m nominal value zero coupon redeemable junior secured serial notes (junior notes). The senior bonds and the junior notes were floated on the capital market, and sold to investors at a discounted price, redeemable annually over 15 years at its nominal value.

[43] The senior bonds were taken up by MIB. Later MBB, Ambank (M)

Bhd, CIMB Bank Bhd, OCBC Bank Malaysia Bhd, RHB Investment Bank Bhd and HSBC Bank Bhd took up the senior bonds. This raised RM176,833,961 cash while the balance of RM131,555,000 was paid by the issue of junior notes to AEM.

CONTRACT STRUCTURE OF PDS PROGRAMME

[44] The contract structure for the PDS programme comprised the following:

(a) a security agency agreement ('SAA') dated 22 May 2003 between Aldwich Bhd, AEM, MIB and the respondent (as trustee for both the senior bondholders and junior noteholder). MIB was appointed as the security agent entrusted, inter alia, with the enforcement of the securities including the power to appoint receivers and/or managers;

(b) a senior bonds trust deed ('SBTD') dated 22 May 2003 between Aldwich Bhd and the respondent under which the respondent was appointed as the trustee of the senior bondholders;

(c) a junior notes trust deed ('JNTD') dated 22 May 2003 between Aldwich Bhd and MTB under which the respondent was appointed as the trustee of the noteholder; and

(d) a debenture dated 22 May 2003 by Aldwich Bhd over its fixed and floating assets.

[45] Thus, the respondent became trustee for both the senior bondholders and the junior noteholder.

[46] Sometime in April 2005, the appellant became the sole holder of the junior notes when he acquired the notes from AEM.

OPERATION OF CL 4.2 OF THE SAA

[47] On 18 January 2010, the respondent issued a notice to Aldwich Bhd that it had not complied with the transaction documents and that it had committed six defaults of the transaction documents. Aldwich Bhd was required to remedy those defaults within 30 days thereof.

[48] On 18 February 2010, an enforcement notice pursuant to cl 4.2 of the SAA was issued to MIB on the ground it had been instructed to do so by a special resolution of the bondholders on the grounds of breach by Aldwich Bhd.

[49] Acting on the enforcement notice, MIB on 8 March 2010, appointed

one Gan Ah Tee and one Mok Chew Yin as the receivers and managers to Aldwich Bhd. The receivers and managers sold the property and plants of Aldwich Bhd for RM20.1m.

THE CIVIL SUITS

[50] The appellant filed Suit No D-22NCC-2339 of 2010 against the respondent and MIB and Suit No D-22NCC-2338 of 2010 against the receivers and managers.

[51] This appeal concerns the decision of the High Court in Suit No D-22NCC-2339 of 2010 in respect of MTB.

[52] The cause of action relied upon in the High Court by the appellant was breach of trust and fiduciary duties, and breach of contract.

[53] In respect of breach of trust and fiduciary duties, it was alleged, inter alia, that:

(a) MTB failed, as common trustee, to exercise fairness between the senior bondholders and the junior noteholder;

(b) MTB failed to realise that the breaches were such as would not prejudice the senior bondholders, and ought to have waived the breaches under cl 28 of the SBTD; and

(c) MTB purported to issue the enforcement notice under cl 4.2 when no special resolution had been passed by the senior bondholders;

thus rendering the issuance of the enforcement notice null and void.

[54] In respect of breach of contract, it was alleged that MTB issued the enforcement notice without a special resolution declaring an event of default as required by the SBTD.

[55] The respondent's defence was that its duties were only administrative in nature and no discretion was vested with the respondent. Furthermore, the transaction documents did not give the respondent any discretion to waive a default.

THE RESPONDENT'S DISCRETION

[56] The submission by counsel for the respondent that any discretion is subject to special resolutions cannot be faulted. Likewise, the pronouncements in *Elektrim SA v Vivendi Holdings QVT Financial LP Corp 1* [2008] EWCA Civ 1178 and *Citibank NA v Law Debenture Trust* [2008] 1 BCLC 376 that the

trustee's duties are merely administrative and ministerial in nature when the clear language of the trust deed so provides.

[57] That the respondent as trustee has no discretion where directed by a special resolution of the senior bondholders is very clear from the words underlined below in cl 11.1 of the senior bond trust deed:

> If any of the following events shall occur … then, the Trustee may, and if *so directed by a Special Resolution of the Bondholders shall* (subject to its right under these presents to be indemnified), declare (by giving notice thereof to the Issuer) that all sums payable under the Bonds are immediately due and payable at the Event of Default Redemption Value …

[58] Likewise, in cl 28 of the SBTD:

> 28. AUTHORIZATION AND WAIVER OF BREACHES
>
> 28.1 The Trustee may, without the consent of the Bondholders and without prejudice to its rights in respect of any subsequent breach, from time to time and at any time, but only if and in so far as in its reasonable opinion the interests of the Bondholders will not be materially prejudiced thereby (or if it is authorised by any express direction given to it by a Special Resolution of the Bondholders authorise or waive, on and subject to such terms and conditions as to it shall seem fit, any breach or proposed breach by the Issuer of any of the provisions, terms and conditions of the Bonds or these presents *PROVIDED ALWAYS that the Trustee shall not exercise any powers conferred on it by this Clause in contravention of any express direction given to it by a Special Resolution of the Bondholders*, (such direction not being inconsistent with any of the express, terms and conditions of these presents) but no such direction shall affect any such authorization or waiver previously given or made. In exercising its discretion, the Trustee shall not be bound to have regard to the past or then current market price of the Bonds. Subject as aforesaid any such authorization or waiver shall be notified by the Issuer to the Bondholders in accordance with the provisions of this Trust Deed and shall be binding upon the Bondholders.

[59] Clearly there is a discretion unless there is a special resolution by the senior bondholders. But where there is no such special resolution, it is equally clearly provided by the use of the word 'Trustee may' in both above clauses that the respondent had a discretion.

[60] It is plain the learned judge did not consider this part of the appellant's case but only because the learned judge made the finding that the respondent had proved there was a special resolution. This aspect is examined further below.

[61] But where a trustee has a discretion, the trustee must act fairly as between competing interests. The receiver stands possessed of the property of the defendant as the court's officer with the duty of dealing with it fairly in the interests of all parties: *Re Newdigate Colliery Ltd* [1912] 1 Ch 468 at p 478. The principle can hardly be disputed. It was applied in *Sabah Development Bank Berhad v Zulkifli bin Kassim & Anor* Kota Kinabalu Civil Suit No K22–52–2006–11.

[62] The *Re Newdigate Colliery* case is also cited for the proposition that if the repudiation of a contract would destroy the goodwill of the corporation, it is the duty of the receiver to preserve it and will not permit the repudiation. This is significant since the property of the company includes its goodwill: see *Salter v Leas Hotel Co* [1902] 1 Ch 332. In this case, the sale of the plant and property of Aldwich Bhd ended its business.

[63] It is also evident that the respondent, holding that it had no discretion, did not exercise any discretion whether or not to waive any breach, declare an event of default or to preserve the value of Aldwich Bhd whether to appoint a receiver or manager instead of abandoning its fiduciary duty as trustee and leave it to the receiver and manager. The respondent's defence depended solely upon there being a special resolution from the senior bondholders.

[64] In conclusion, if there was in fact a special resolution from the senior bondholders, then it cannot be said that the learned judge had erred. The issue, therefore, would turn upon whether or not there was a special resolution.

THE SPECIAL RESOLUTION

[65] The learned judge dealt with the question of whether there was a special resolution. A finding was made that the respondent had proved that there was a special resolution by the senior bondholders as asserted by the respondent. That finding was reasoned as follows:

(a) Aldwich Bhd by its letter of 24 February 2010 acknowledged the respondent's letter of 18 February 2010 as amounting to a letter of notification to Aldwich Bhd of the valid declaration by the senior bondholders of the event of default;

(b) in the face of the letter of 24 February 2012, both Aldwich Bhd and the appellant are estopped from alleging that they were not in receipt of a proper letter of notification of the passing of the special resolution by the senior bondholders or that they understood the respondent's letter to mean something else;

(c) that the appellant accepted during cross-examination that he was the person behind Aldwich Bhd and was aware of the declaration of default by the senior bondholders;

(d) there was the respondent's contemporaneous letter representing that 95.02% of the nominal value of the bonds remaining outstanding had passed the circular resolution on 18 February 2010;

(e) that this is borne out by the circular resolution by CIMB holding 19%;

(f) accepted the evidence of DW4 that special resolutions similar to the sample by CIMB were signed by over 95% of the senior bondholders;

(g) the clause requiring a special resolution before the respondent can declare an event of default existed for the benefit of the bondholders and not the appellant and as such the appellant was not entitled to a copy of the special resolution;

(h) that if the special resolution was critical to prove its claim, the appellant ought to have sought discovery during discovery proceedings;

(i) the appellant did not seriously dispute during cross-examination that the senior bondholders had passed the resolution declaring the event of default;

(j) that it stands to reason the appellant would not have agreed to the declaration of an event of default under the junior note if the appellant genuinely believed the declaration of the event of default by the senior bondholders to be invalid due to the absence of the circular resolution;

(k) that the issue of existence of the special resolution was a change of tack in the foundation of the appellant's claim as plaintiff where originally the unhappiness of Aldwich Bhd was over the appointment of the second and third defendants in Suit No D-22-NCC-2338 of 2010 as managers only and not receiver and manager; and failure of the respondent to act in the interests of Aldwich Bhd considering it was free of blame;

(l) that the change of tack was clearly out of desperation;

(m) since it was never the plaintiffs pleaded case that the senior bondholders had not passed the necessary special resolution, the appellant can hardly complain if the respondents chose to give oral evidence concerning the existence of the special resolution; and

(n) accordingly rejected the submission that the respondents were in breach of cll 4.2 of the SAA and 11.1(c) of the SBTD when issuing the enforcement notice of 18 February 2010.

[66] Reasoning, as distinct from an assessment of credibility based upon the audio visual advantage a trial judge has of hearing and seeing the demeanour of

a witness giving his testimony and tested under cross-examination, can be reviewed by an appellate court. If the reasoning erred in law, principle or relied upon as fact something contrary to the evidence before him, and that error led the trial judge to a conclusion it otherwise would not have made, the appellate court has a duty to intervene to correct the error by exercising the discretion that was with the court of original jurisdiction. But not otherwise, for that would be an unwarranted interference with that court's jurisdiction.

[67] That the respondent's letter of 18 February 2010 amounted to a notification to Aldwich Bhd of a valid declaration by the senior bondholders is not to my mind the issue. Likewise, that the appellant was the man behind Aldwich Bhd and was aware of the declaration of default by the senior bondholders of the event of default. The issue is whether the representation by the respondent that there was a special resolution by the senior bondholders was in fact true or false. It was not a case of the appellant alleging they were not in receipt of a proper letter of notification of the passing of a special resolution by the senior bondholders or that the appellant understood the respondent's letter to mean something else.

[68] The crux of the matter is that whether or not there was a special resolution was a matter only within the knowledge of the senior bondholders and the respondent since neither Aldwich Bhd nor the appellant are privy to the issue and existence of the special resolution by the senior bondholders under which the respondent purported to be obliged to declare an event of default and to notify the security agent to appoint a receiver and manager. The earlier acknowledgement by the appellant, and subsequent to the declaration of an event of default under the junior bond were clearly expressions of the belief, trust and reliance placed by Aldwich Bhd and the appellant in their trustee and the trustee's statement that there was a 95.02% special resolution. It is inequitable to hold that against the appellant and to apply an estoppel. Estoppel is an equitable doctrine to be applied equitably as the circumstances warrant it.

[69] Without an estoppel being applied against the appellant, the fact that after asserting in its notification to Aldwich Bhd that it was acting under a special resolution of 95.02% of the outstanding coupon nominal value of the senior bondholders, the respondent failed to produce the resolutions to substantiate its assertion is prima facie proof that the respondent did not have such aggregate of special resolution.

[70] The trust deed had defined special resolution specifically as meaning a resolution passed at a meeting of the bondholders duly convened and held in accordance with the provisions contained in this trust deed and carried by a majority consisting of not less than three-fourths (3/4) of the persons present

and voting thereat upon a show of hands or if a poll is duly demanded, by a majority consisting of not less than three-fourths (3/4) of the votes given on such poll. The CIMB circular special resolution hardly suffices.

[71] The learned judge stated in His Lordship's judgment that he accepted the testimony of DW4. With respect, nowhere in the judgment was it set out on what grounds the testimony of DW4 was accepted. Other than that the appellant 'did not seriously dispute during cross-examination that the senior bondholders had passed the resolution declaring the event of default'. However, with utmost respect, the transcript of proceedings of 15 August 2011 show that in the cross-examination of Ms Jennifer Wong ('DW4') at line 644, it was the learned judge who stopped cross-examination on the existence of the special resolution:

> 644 YA: Yes, you can submit on that if it's not there, is not there, it is not going to drop from the sky.

[72] Having been so directed to submit upon it, it was professionally incumbent upon counsel to abide by the direction and desist from further pursuing the subject. That compliance with the direction of the learned judge cannot then be held against the appellant.

[73] There is nothing in the judgement of the learned judge that he did so from observation recorded in his notes of proceedings of the demeanour of the witness, let alone to explain what is it, from the audio visual advantage he had as trial judge, that satisfied the learned judge to accept the testimony of DW4 as proof that the respondent did have the 95.02% special resolution as asserted. Such unexplained acceptance must be examined to ensure it is not misplaced.

[74] There were correspondence where Aldwich Bhd sought evidence of duly executed circular resolutions of the senior bondholders culminating in the reply by Ms Jennifer Wong as head, operations of the respondent on 8 March 2010 to Aldwich Bhd for the attention of the appellant and one En Muhammad Shair bin Pawanchik as follows:

> Reference is made to your letter of 4 March 2010. We have referred your request to the Bondholders and wish to inform you that the Bondholders do not consent to release their duly executed Circular Special Resolutions to you.
>
> The Bondholders have nonetheless instructed us to inform you that Bondholders representing 95.02% of the nominal value of the Bonds remaining outstanding had approved the Circular Special Resolutions on 18 February 2010.

[75] The respondent cannot, therefore, maintain that they were taken by surprise as to the production of the special resolution. The primary evidence of

the special resolutions as defined in the SBTD are the special resolutions themselves. The letter of 8 March 2010 is admission it is not 'lost'. No good reason was given for not producing the special resolutions. No senior bondholder was called to explain why they did 'not consent to release their duly executed Circular Special Resolution …'. In the circumstances, the alleged refusal appears to be only a feeble excuse why only the CIMB resolution could be produced. Certainly it provides no reason why secondary evidence of the special resolutions in the form of testimony of DW4 and assertions in correspondence should instead be accepted. Where safe evidence is available, there is no reason to subject a court of justice to reliance to lesser evidence.

[76] A party can hardly be able to prove the negative. In the circumstances, given that the respondent knew (a) that Aldwich Bhd and by extension the appellant, had sought the production of the circular special resolutions from the respondent; (b) that its existence is relied upon by the respondent; and (c) that the evidence of its existence is only with the respondent and the senior bondholders, then the production by the respondent only of the CIMB 19% serves not as proof that the respondent in fact had the 95.02% as asserted, but is in fact prima facie proof that it only had a 19% circular special resolution. That is well short of the 75% required under the transaction documents.

[77] In all the circumstances, the respondent's letter cannot serve as contemporaneous evidence of the existence of 95.02% special resolution but only as evidence of the representation that the respondent had the 95.02% special resolution. But the representation is not evidence of the existence of the 95.02% special resolution.

[78] If there was surprise, it was occasioned by the failure of the respondent to produce at the trial the special resolutions it had all along represented and maintained that it had. The respondent's assertion that it had the special resolution is its defence. In *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31 (FC), it was held by the Federal Court in a libel case that since the appellants relied upon the defence of justification and fair comment, the burden of proof rested entirely upon them, and where they had failed to prove their imputations, judgment was rightly given to the respondents. The principle has been applied in *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd & other appeals* [2007] 6 MLJ 530; [2007] 5 CLJ 489 (CA) and more than 50 reported cases in the High Courts.

[79] That the requirement for a special resolution was for the protection of the bondholders only and not Aldwich Bhd is debateable. It can be argued that requiring a minimum 75% of the outstanding aggregate nominal coupon value

protects Aldwich Bhd from the whim and fancy of any single senior bondholder unless he holds at least 75%. No conclusions can be drawn from this.

[80] Discovery proceedings to seek discovery before the trial itself, to enable it to check and verify before trial that evidence relied upon as to its genuineness. It is to avoid having to adjourn the trial unnecessarily, and to ensure, when evidence is disputed, that the evidence produced before the court to be admitted into evidence and to be taken into consideration are genuine or authentic. If discovery before trial is not sought it only means that the party does not feel it necessary to challenge the authenticity of that evidence when produced. It is an exercise of calculated judgment on the part of that party whether to seek opportunity to check and verify the authenticity of the evidence relied upon. But not seeking discovery does not excuse and exempt the party upon whom a burden of proof resides from discharging his burden by producing the evidence. Not seeking discovery is not an admission of the disputed fact for which the evidence is sought to be admitted.

[81] In all the circumstances, there is nothing to warrant the labels of change of tack and desperation applied upon the appellant. The learned judge, however, is entirely right no one can complain as to what evidence any party chooses to rely on. The only relevant question is whether that party succeeded in discharging the burden of proof that is upon him. That involves a consideration of whether the evidence that party chose to produce is sufficient to discharge the burden that is upon him.

[82] Further, it is evident that, from the foregoing that by the respondent's reliance upon the mandatory requirement leaving it with no discretion but to act to declare an event of default and issue notice to the security agent MIB to appoint a receiver and manager, the respondent had not exercised any discretion conferred upon it under cll 4.2 and 28 of the SBTD.

[83] Clause 11.1 of the SBTD set out the various events of default. Then cl 11.2 of the SBTD provided:

> 11.2 Notwithstanding the declaration of a Trigger Event, the Trustee may, and if so directed by a Special Resolution of the Bondholders, shall declare an Event of Default (by giving notice thereof to the Issuer) if, subsequent to the declaration of such Trigger Event, an Event of Default has occurred and that all outstanding Bonds shall, notwithstanding such declaration of a Trigger Event, be immediately due and repayable at the Event of Default Redemption Value.

[84] In plain language, it says that notwithstanding that there had been a declaration of a trigger event, then if subsequent to it that declaration of a

trigger event an event of default occurred, then the respondent as trustee may and if so directed by a special resolution, shall declare an event of default by giving the necessary notice to Aldwich Bhd and all outstanding bonds shall be immediately due and repayable at the event of default redemption value. In other words, the declaration of event of default under cl 11.2 must necessarily refer to a separate or new event of default arising or emerging after the declaration of a trigger event.

[85] Since various events provide the trustee with a discretion that could be taken away by a direction by way of a special resolution by the senior bondholders, the purported refusal by the senior bondholders to release a copy of the special resolution became, to say the least, intriguing.

[86] For the foregoing reasons, the learned judge had erred. It is evident from the foregoing that if had not so erred he could not have dismissed the appellant's claim, but would have entered judgement for the appellant on the ground that consequent upon the failure by the respondent to produce evidence of the special resolution by senior bondholders holding at least 75% let alone 95.02% aggregate nominal coupon value of the outstanding senior bonds, the appellant had proved upon a balance of probabilities that respondent did not have the special resolution as defined in the trust deed. If it is true, the decision of the senior bondholders to allow production of the special resolutions was their own invitation to misfortune. Be that as it may, the acts of the respondent founded upon the purported special resolution are accordingly null and void.

[87] Although the appellant addressed the issue of the damages and sought costs here and below, it was not addressed in the submissions for the respondent. Given the quantum sought, it is only prudent that the quantum be assessed.

[88] In conclusion, I would allow the appeal, set aside the order of the High Court, enter judgment for the appellant with costs and an order that the quantum of damages claimed be assessed, and further that the costs in the sum of RM75,000 as awarded by the panel instead be paid by the respondent to the appellant.

Appeal dismissed with costs of RM75,000.

Reported by Kohila Nesan